

# Connecticut Updates: A Roundup of Federal and State Actions

**January 21, 2021**

**1:00 PM – 2:00 PM**

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## Agenda

- COVID-19 vaccine mandates
- Independent contractor status in flux
- Supreme Court updates
- Connecticut Paid FMLA
- Connecticut Uniform Trade Secrets Act (CUTSA) – relevant litigation
- Families First Coronavirus Response Act

## COVID-19 Vaccine

- Vaccines and mandates are a controversial issue
  - Public health goals conflicting with individual freedoms to refuse a medical procedure
  - Concerns over rushed development of vaccines and possible side effects

## Government vaccine mandates

- Federal:
  - No federal mandates yet; public health and safety generally delegated to the States under the Constitution
- States:
  - State and local governments have relatively broad discretion to mandate vaccines, based on (old) U.S. Supreme Court precedent, Jacobson v. Massachusetts (1905), subject to limitations for medical and religious reasons
  - Bills pending in at least 9 states to prohibit discrimination because of vaccinated status; not just for employees

## Connecticut - Vaccine Mandates

- No COVID-19 vaccine mandate for the general public and no bills or agency rulemaking pending related to COVID-19 vaccine

## Can employers mandate employees receive a COVID-19 vaccine?

**Answer:** Yes (maybe)

- EEOC guidelines (12/16/20) suggest employers can mandate COVID-19 vaccines for their employees without violating the Americans with Disabilities Act if:
  1. the employees get the vaccine from a third-party; and
  2. the employers make accommodations for religious objections under Title VII of the Civil Rights Act and disability-related objections under the ADA.
- EEOC opinion rests on assumption employer has not done a disability-related screening inquiry

## Can employers mandate employees get a COVID-19 vaccine? (cont.)

- BUT, if vaccine is administered by the employer or its contractor, the employer must show that any disability-related screening inquiries are “**job-related and consistent with business necessity**”
- To meet this standard, an employer would need to have a reasonable belief, **based on objective evidence**, that an employee who does not answer the questions and, therefore, does not receive a vaccination, **will pose a direct threat to the health or safety of her or himself or others**

## Is an unvaccinated employee a “direct threat” to others?

- The EEOC suggests unvaccinated worker could be a direct threat, but also emphasizes an “individualized assessment” is needed to assess “potential harm”
- What’s the objective evidence an unvaccinated person is direct threat to others?
- The EUAs for the current vaccines were granted on showing the vaccines reduced moderate to severe COVID-19 symptoms
- No data exists that the currently approved vaccines reduce transmission according to the CDC, Dr. Fauci, and the manufacturers
- A reasonable question exists as to whether an unvaccinated employee poses any greater risk of transmission than a vaccinated employee based on current data



## Do mandates for COVID-19 vaccine trigger the public policy exception to employment at-will?

- Public policy exception: an employer cannot terminate an employee if it would violate the doctrine of public policy of a state, or state statute, or federal statute
- Current vaccines only given Emergency Use Authorization (EUA), which allows the use of “**unapproved medical products**” in certain emergencies
- FDA requires recipients be informed they have the option to refuse the vaccine offered under an EUA
- Connecticut has acknowledged the possibility of a public policy exception to employment-at-will

## Additional Issues With COVID-19 Vaccine Mandate

- Religious Exemptions
  - Extends not just to organized religions, but extends to “others who have sincerely held religious, ethical, or moral beliefs”
- Unionized employers - vaccination would be a mandatory subject of bargaining
- Possible negative impact on morale, including risk of collective activity protected by the NLRA
- OSHA retaliation issues
- Workers’ compensation claims for vaccine injuries

## Independent Contractor Rules

Trump Administration (Proposed Rule 9/22)	Biden Administration*
Economic Reality Test	ABC Test
<p><b>Core Factors:</b></p> <ul style="list-style-type: none"> <li>Nature and degree of worker's control over the work</li> <li>Worker's opportunity for profit or loss based on initiative or investment</li> </ul> <p><b>Other Factors:</b></p> <ul style="list-style-type: none"> <li>Amount of skill required, degree of permanence of the working relationship, whether the work is part of an integrated unit of production</li> </ul>	<p>Companies must show a worker has freedom from control over how to perform the services they provide; that the services are outside the business' normal variety of work; and that the worker is engaged in an independently established role</p> <p><i>Vazquez v. Jan-Pro Franchising Int'l</i> (Cal. 2021) says ABC test applies retroactively, making businesses potentially liable for lawsuits filed years before the standard existed</p>
<b>Bottom Line:</b> Comparatively flexible standard resulting in more contractor classifications	<b>Bottom Line:</b> Broader test resulting in more employee classifications

\*Note that state law may call for a more stringent standard

## Supreme Court Updates

- *Bostock v. Clayton County* (2020) – Title VII prohibition of employment discrimination because of sex prohibits employment discrimination because of both transgender status and sexual orientation of plaintiff.
- *Henry Schein Inc. v. Archer and White Sales Inc.* No. 19-963- Court will review whether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise "clear and unmistakable" delegation of questions of arbitrability to an arbitrator.
- *Van Buren v. United States*, U.S. Supreme Court, No. 19-783 – Court will review whether a person authorized to access information on a computer for specific purposes violates the federal Computer Fraud and Abuse Act by accessing the same information for an improper purpose.

## Connecticut Paid FMLA

- As of January 1, 2022, qualifying employees are eligible for up to 12 weeks of paid FMLA in 12 months
- Enacted June 25, 2019; employee contributions as of January 1, 2021; benefits payable as of January 1, 2022
- Effective July 1, 2022, employers must provide:
  - Notice of rights to new hires
  - Annual notice to all employees
  - (Conn. Gen. Stat. Ann. P.A. 19-25, § 13.)

## Connecticut Uniform Trade Secrets Act (CUTSA)

- *Dur-A-Flex, Inc. v. Samet Dy* (Conn. 2020)
- 109-day trial reviewing former employee's ventures after employment with Dur-A-Flex and investigating whether trade secrets were used in his subsequent employment
- No liability for those defendants who did not have reason to know that employee was using alleged trade secret information in his dealings with them

## Additional Developments

- Families First Coronavirus Response Act - parts extended to 3/31/21
- NLRB - President Biden calling for resignation of GC Robb; signals swift end to pro-management era

## Questions?

Check for real-time updates on Verrill's Taking Care of HR Blog!

<https://www.verrill-law.com/taking-care-of-hr-business/>

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